FILE COPY

Office Supreme Court, U.S.
FILED
DEC 8 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1958

No. 564

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs-METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO F. HANAN,
CHARLES J. CARROLL, JR.,
Counsel for Petitioner,
99 John Street,
New York 38, N. Y.

Bowne & Co., Inc., 163 Front Street, New York 38

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
The Findings of the District Court Were Not Clearly Erroneous	4
Reasons for Granting the Writ	13
Conclusion	20
Appendix—Opinion of the District Court	1a
Opinion of the United States Court of Appeals	14a
Judgment of the Court of Appeals	49a
Excerpts from Testimony	51a
Statute	56a

CITATIONS

Cases:

A. H. Bull S. S. Co. v. United States, 2 Cir., 34 F. 2d 615	10, 17
Construction Aggregates Co. v. Long Island R. Co., 105 F. 2d 1009	18
The Delaware, 66 F. 2d 467	18
Ira S. Bushey & Sons, Inc. v. Standard Oil Co. of Cal., (EDNY) 99 F. Supp. 63; 2 Cir., 197 F. 2d 788	19
LeTulle v. Scofield, 308 U. S. 415	14

PAGE

McAllister v. United States, 348 U. S. 19 14

Morley Construction Co. v. Maryland Casualty Co., 300 U. S. 185 14

Rogers v. Missouri Pacific R. R. Co., 352 U. S. 559, 1 L. Ed. 515 14

Tucker v. Socony No. 9, 167 F. 2d 685 18

United States of America v. Steamtug William H. McAllister, (SDNY) 110 F. Supp. 745 18

Statutes:

28 U. S. Code, Sections 1254(1); 2101(c) 2

Title 33 C. F. R. Sec. 80.03 ..... 17, 20

Rule 1, Article 18 Inland Rules of Navigation, 33 U. S. C. 203 ..... 3, 17, 20

46 U. S. C. Sec. 183 3

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

METROPOLITAN SAND & GRAVEL CORPORATION, as owner of the Tugs METROPOLITAN No. 2 and METROPOLITAN No. 3, and the Sand Scows G-G 202, G-G 150 and G-G 104,

Petitioner,

against

DEEP SEA TANKERS, LIMITED, as owner of the s/t RINCON HILLS, and as bailee of the cargo laden thereon, and SHELL OIL COMPANY, INCORPORATED, as charterer of said vessel,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-Petitioner, Metropolitan Sand & Gravel Corporation prays that a writ of certiorari issue to review the judgment in admiralty of the United States Court of Appeals for the Second Circuit in the above entitled matter. The judgment of the Court of Appeals, which was entered on July 14, 1958, reversed a decree of the United States District Court for the Southern District of New York dismissing the libel against petitioner and petitioner's tugs *Metropolitan No. 2, Metropolitan No. 3* and it's sand scows *G-G 202, G-G 150* and *G-G 104.*

The Court of Appeals held that petitioner's tug *Metropolitan No. 2* was liable but granted limitation of liability pursuant to Title 46 U. S. C., Section 183 as to that vessel.

Although the Court of Appeals agreed with the District Court that the tug *Metropolitan No. 3* and the three sand scows were without fault, it entered judgment reversing, in its entirety, the District Court's decree exonerating those four vessels. (Appendix hereto at pp. 49a, 50a).

The Opinions of the Courts Below.

The opinion of the District Court dismissing the libel in *Deep Sea Tankers Limited, et al* v. *The Steamtug Long Branch, et al* (reported in summary in 1956 A. M. C. 1723 and is not otherwise reported), is printed in the appendix hereto (A. 1a-13a).

The opinion of the United States Court of Appeals for the Second Circuit is reported in 258 F. 2d 757 and is printed in the appendix hereto (A. 19a-48a).

The judgment in this matter is reproduced in the appendix hereto (A. 14a-48a).

Jurisdiction.

The decision and judgment of the Court of Appeals for the Second Circuit, sought to be reviewed, were entered on July 14, 1958.

Petitioner filed a timely petition for rehearing, which was denied on September 9, 1958, without opinion.

Jurisdiction of this Court is found in 28 U. S. Code, Sections 1254 (1); 2101 (c), as well as in Rule 19b of the Rules of this Court under this Court's power of supervision over the federal judiciary system.

Questions Presented.

1. Whether the Court of Appeals applied proper standards in holding that the findings of the District Court were clearly erroneous.

2. Whether the Court of Appeals under the standards applied reached the proper result, as to liability, on findings made by it.

3. Whether the Court of Appeals properly reached the question as to limitation of liability.

Statute Involved.

Rule 1, Article 18 Inland Rules of Navigation, 33 U. S. C. 203.

Statement.

Deep Sea Tankers, Limited and Shell Oil Company, Incorporated have filed their petition for certiorari with respect to that part of the decision of the Court of Appeals which granted cross-petitioner, Metropolitan Sand & Gravel Corporation, limitation of liability to the value of the tug *Metropolitan No. 2*, pursuant to the right of limitation set forth in Title 46 U. S. C., Section 183. The present petition is being filed by Metropolitan Sand & Gravel Corporation in order to obtain a review of the merits of that part of the Court of Appeals decision which imposed liability on petitioner and gave rise to the question as to limitation of liability because the findings of the District Court were clearly erroneous.

The trial in the District Court was before the late Judge Henry W. Goddard. The trial began on March 11, 1955 and ended on June 10, 1955, at which time decision was reserved and the parties were directed to file briefs and reply briefs. Judge Goddard died suddenly in August, 1955 before any briefs were filed.

By agreement of all parties the matters involved were submitted to Chief Judge John W. Clancy of the Southern District of New York for decision by him on the record made at the trial, the exhibits, briefs and oral argument, if desired.

Judge CLANCY filed his opinion and decision dismissing the libel and a final decree was entered pursuant thereto.

The respondents appealed from the decision and final decree to the Court of Appeals for the Second Circuit on the ground that Judge CLANCY's findings were clearly erroneous.

The Court of Appeals, in reversing the final decree, held that the findings of the District Court were clearly erroneous, because the Court of Appeals put a different construction upon and made a different interpretation of the evidence.

The Findings of the District Court Were Not Clearly Erroneous.

Respondents filed a libel against petitioner, its tugs *Metropolitan No. 2, Metropolitan No. 3* and its sand scows, to recover damages sustained by the tanker *Rincon Hills* and the cargo laden thereon, as a result of the tanker running aground on Dimond Reef, which is located between the Battery and Governors Island, New York Harbor, N. Y.

The tanker when proceeding from the main ship channel, New York Harbor to the East River, New York Harbor, was proceeding in an easterly direction and on the East River Deep Water Range course between the Battery and Governors Island. The range course would keep the tanker well clear of Dimond Reef, which would be to the right of the tanker and north of Governors Island. Petitioner's hawser tow, made up of the tug *Metropolitan No. 2* and three loaded sand scows, in tandem, was proceeding westerly, south of the Battery and north of the range course. Respondents claimed that to avoid a collison the tanker had to proceed under a right wheel which took her to the south of the range course and toward Dimond Reef.

The District Court held that the grounding of the *Rincon Hills* was due, amongst other faults, to an admittedly wrong right wheel maneuver executed by the wheelsman of the *Rincon Hills* contrary to and in violation of a

proper and usual order given to him by the pilot and second officer of the tanker. The wheelsman was ordered to put the wheel hard left so as to proceed in the normal manner, from the range course up into the East River on a general northerly course. Instead of executing the proper order the wheelsman admittedly put the wheel hard right because he thought there was danger of collision between the tanker and a railroad carfloat tow in no way connected with petitioner.

A hard right wheel would result in the tanker leaving her course by going southerly of the range course and toward Dimond Reef, where she eventually grounded.

The Court of Appeals could not and would not find that the tanker would have grounded even though the hard left wheel order had been properly executed. At the time of the wrong wheel maneuver the court below was unable to determine the position of the tanker with relation to the range course or Dimond Reef.

The Court of Appeals held that at the time of the wrong wheel maneuver of the tanker, danger of collision between the tanker and the railroad carfloat tow had passed. However, the Court of Appeals excused the wheelsman and the tanker, holding that the wrong wheel maneuver was in error in extremis.

In order to avoid the consequences of the admitted wrong wheel maneuver the respondents claimed that the tanker had to proceed under a right wheel in order to avoid a collision. The District Court found that no such action occurred.

The Court of Appeals, in holding that the findings of the District Court were clearly erroneous, summarized the testimony and contentions of tanker pilot Rowohlt as follows:

> The substance of his recital at the trial of the tanker's maneuvers prior to the 'hard left, full ahead' order was: after the single blast he steadied on the Range in a matter of seconds at half speed;